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No. 91-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY HOUSING AUTHORITY, HENRY BRESKY, JOHN ARAKEL, LEO LIEBERMAN, LARRY LEFKOWITZ, CYRIL GROSSMAN and RITA COSS,

Petitioners,

vs.

CATHERINE OWENS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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Introduction

Respondent Catherine Owens's brief in opposition to the writ acknowledges implicitly that the rulings by the court below, regarding the appropriate tests for (1) employee qualifications in discriminatory discharge cases and (2) district court jurisdiction to hear retaliation claims not previously filed with the Equal Employment Opportunities Commission ("EEOC"), do not accord with the standards followed in a majority of the circuits. This acknowledgment takes the form of a persistent refrain — that the court below really did not mean what it said.

The court below ruled that a discharged employee need only show "the basic skills necessary for performance of the job" to establish the qualification element of a prima facie case. *Owens v. New York City Housing Authority*, 934 F. 2d 405, 409 (2d Cir. 1991), quoting *Powell v. Syracuse University*, 580 F.2d 1150, 1155 (2nd Cir.), cert. denied, 439 U.S. 984, 99 S.Ct 576, 58 L.Ed 2d 656 (1978) (Appendix to Petition, hereafter "App." at A-7.) Nevertheless, Owens now asserts that the court below really followed its prior rule in *Meiri v. Dacon*, 759 F.2d 989 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985), which had recognized the need to review the employee's work history, in the light of the employer's "legitimate expectations" regarding job performance. *Id.* at 995. (Respondent's Brief, hereafter "Br. " at 21, fn. 10.) This assertion is mere wishful thinking. The court below had, indeed followed the majority standard in *Meiri*, but expressly departed from that standard in the decision below.

The court below also ruled, in the plainest of terms, that an unfiled "retaliation claim is ***deemed*** 'reasonably related' to the original EEOC filing." *Owens*, 934 F. 2d at 411. (Emphasis added.) Nevertheless, Owens asserts that the decision below does not depart from the majority rule that a factual relationship between the filed and unfiled charges must be established. This is, likewise, wishful thinking. In reality, the court below did not apply the majority standard.

In this reply brief, the Housing Authority will address the need for Supreme Court review at this time, in the light of the Second Circuit's departure from standards applied by a majority of the circuits with respect to critical issues in employment discrimination cases. This brief will also address the error committed by the court below in failing to correctly apply New York law regarding issue preclusion, the impact of that error on the question of Owens's qualification for employment and the divisions among the circuits on the question of under what circumstances may a district court adjudicate a retaliation claim not previously filed with EEOC.

I. Review at this time will promote federal interests and enhance judicial economy.

Owens urges denial of the writ because the judgment below remanded this case for further proceedings. (Br. 10-12.) However, this Court has reviewed such judgments where the Court's decision will be "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). *See also Michael v. United States*, 454 U.S. 950 (1981) (White, J., dissenting). The Court's decision here will determine two issues fundamental to the further conduct of this case – the proper standard for the "qualified" prong of Owens's prima facie case, and the proper standard for "reasonably related claims" that need not be filed with the EEOC. The Court's decision could hardly be more fundamental since it will determine whether respondent's claims survive.

Owens asserts this case is not ripe for review (Br. 11), but fails to cite a single issue of fact or law requiring development by the district court. The essential facts of this case are clear; state and federal tribunals have examined them fully and reached the same conclusions. The legal issues are also clear; most of the circuits have dealt with them and a majority have reached conclusions at odds with the decision below.

Owens suggests that denying the writ will speed justice for her. (Br. 12) On the contrary, if the Court denies the writ, Owens will have to wait years to know the standards governing her claims, and whether possible success at trial would survive appeal. By determining those standards now, the Court will speed justice for Owens, the Housing Authority, and hundreds of other parties in similar cases across the nation. The Court will also spare lower courts the burden of hearing cases that will only be reversed on appeal.

II. Owens was collaterally estopped from relitigating her lack of qualification for employment.

Owens contends that this Court should not address this issue because the court below, denying preclusive effect to Owens's disciplinary proceeding and the resulting Article 78 judicial proceeding, correctly applied New York law regarding collateral estoppel. (Br. 14, 17) However, if the issue of Owens's qualification for employment was fully and fairly litigated during those state proceedings, the court below, by failing to apply the doctrine of issue preclusion, did not correctly apply New York law.[1]

In New York, a judgment in a prior Article 78 proceeding precludes a federal plaintiff from re-litigating issues that were fully and fairly litigated and necessarily determined in the Article 78 proceeding. *Davis v. Halpern*, 813 F.2d 37, 39 (2d Cir. 1987); *Hill v. Coca Cola Bottling Co.*, 786 F. 2d 550, 553 (2d Cir. 1986)[2]; *D'Arata v. New York Central Mutual Fire Insurance Co.*, 76 N.Y. 2d 659 (1990); *Halyalkar v. Board of Regents*, 72 N.Y.2d 261, 266 (1988). Moreover, under New York law, a party may not relitigate an issue which was implicit in a prior ruling, but a necessary element of that ruling. *D'Arata*, *supra*, 76 N.Y. 2d at 667; *Vavolizza v. Krieger*, 33 N.Y. 2d 351, 356, fn.2 (1974).

The court below correctly ruled that Owens is precluded from relitigating the finding of misconduct in the state court

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[1] Owens's brief endeavors to cloud this issue by arguing that an Article 78 proceeding does not bar a subsequent Title VII or ADEA claim. (Br. 17-18) The Housing Authority does not dispute this point and does not present it for review. The issue is not whether Owens is precluded from litigating a discrimination claim. Rather, it is whether an issue fully and fairly litigated in prior state proceedings may be relitigated in a federal action. Simply put, the question is one of issue preclusion, not claim preclusion.

[2] Owens asserts that the Housing Authority has cited no case holding that a plaintiff may be collaterally estopped by a determination of misconduct outside the forum of a discrimination action. (Br. 18) However, *Hill v. Coca Cola*, *supra*, on which Owens erroneously relies (Br. 17, 19), is just such a case.

proceeding. *Owens, supra*, 934 F. 2d at 409 (App. A-7). Under New York law, Owens is also precluded from relitigating every issue implicit in the finding of misconduct: whether there was substantial evidence to support the charges of which Owens was found guilty at her disciplinary hearing and whether she had been afforded a fair hearing by an unbiased hearing officer.[3]

In relegating to a footnote the issue of competence, as addressed in Owens's state proceedings, and interjecting the question of whether that finding was necessary to sustain Owens's dismissal, the court below confused issue preclusion with claim preclusion. *Owens, supra*, at fn. 2 (App. A-8). In the context of issue preclusion, the question of necessity applies only to issues implicitly litigated in the prior proceeding. *See, Halyalkar, supra*, 72 N.Y. 2d at 268. As the court below acknowledged, Owens's competence was expressly addressed in the prior proceeding. *Owens, supra*. Moreover, as a matter of New York law, the issue of Owens's qualification for her job was implicit in, and thus necessarily decided, by the findings in the prior proceeding that Owens has committed numerous acts of misconduct, as well as the finding of incompetence, warranting her dismissal. Under *Vavolizza, supra*, and *Halyalkar, supra*, the key to determining whether an issue was necessarily decided is whether it can fairly be said that the party against whom preclusion is asserted knew what was at stake. In the state administrative and judicial proceedings, which included an eight-day disciplinary hearing as well as the state court Article 78 proceeding (App. A-84), Owens could not help but know that her qualification for her job was at issue.[4]

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[3] Owens's age discrimination claim rests upon her theory that she was qualified for her position, but that her supervisors nevertheless concocted the disciplinary charges against her. (App. A-31) The state court necessarily rejected this theory when it found that the findings of incompetency and misconduct were supported by overwhelming evidence, that the gravity of the charges warranted the penalty of dismissal, and that Owens received a fair and painstaking hearing. (App. A-85-86)

[4] During her disciplinary hearing, counsel for Owens and the Housing Authority stipulated to admission in evidence of a chart which documented Owens's

(Footnote Continued)

The cases Owens cites to oppose issue preclusion are inapposite for a variety of reasons. As previously noted, *Hill v. Coca Cola Bottling Co.*, *supra*, held that the plaintiff could not relitigate the issue of his misconduct, decided in a prior Unemployment Insurance hearing decision and the Article 78 proceeding which affirmed that decision. The *Hill* Court held that plaintiff's discrimination *claim* was not precluded by the Unemployment Insurance hearing, since it was not litigated in that proceeding. *Id.* at 553. Moreover, the issue of competence or job qualification is not germane to that type of hearing and was not raised either in the state or federal proceedings. Similarly, *Board of Education of Manhasset v. New York State Human Rights Appeal Board*, 106 A.D. 2d 364, 482 N.Y.S.2d 495 (2d Dept. 1984) (cited at Br. 17-18), denied claim preclusion to the results of an Unemployment Insurance hearing. In addition, the *Manhasset* court held that the hearing was fraught with procedural defects which no one now contends occurred in Owens's disciplinary hearing. 106 A.D. 2d at 366. *Delgado v. Lockheed-Georgia Co.*, 815 F. 2d 641 (11th Cir. 1987) (cited at Br. 19) similarly denied preclusive effect to the results of an Unemployment Insurance hearing which had never received judicial review. As the *Delgado* court correctly held, an unreviewed administrative decision by an agency not charged with hearing discrimination claims could *not* have preclusive effect in an ADEA action. *Id.* at 646-47.

DeCintio v. Westchester County Medical Center, 821 F. 2d 111 (2d Cir.), cert. denied, 484 U.S. 965 (1987) (cited at Br. 17), is not in point because (1) DeCintio never sought state court review of his disciplinary dismissal[5]; and (2) his Title VII claim was based solely on alleged retaliatory action. Since qualification is not an element of a Title VII retaliation claim, the plaintiff's qualification for the job from which he was terminated was

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job performance, relative to her coworkers' performance. (App. A-79-80) Moreover, during her direct testimony, Owens denied that she was incompetent. The Hearing Officer rejected her denial as contrary to the evidence. (App. A-80)

[5] Accordingly, unlike the case at bar, no finding in DeCintio's disciplinary proceeding could have preclusive effect. *University of Tennessee v. Elliot*, 478 U.S. 788 (1986).

simply not at issue. *DeCintio, supra*, 821 F. 2d at 115.[6] Without identity of issues, there can be no issue preclusion.

Owens asserts that *Jalil v. Avdel Corp.*, 873 F. 2d 701 (3d Cir. 1989), cert. denied, ____U.S.____, 110 S. Ct. 725 (1990) (cited at Br. 18-19, 24) is "factually identical to the case at bar and congruent with the Second Circuit's holding." (Br. 18) That statement is absurd because, in sharp contrast to the record established in Owens's state proceedings, (1) Jalil's "gross insubordination" was his failure to obey a supervisor's order to remove a radio headset, *Id.* at 703; and (2) Jalil's "satisfactory performance of duties over a long period of time leading to a promotion clearly established his qualifications for the job." *Id.* at 707. Clearly, the Third Circuit, unlike the court below in the case at bar, considered the plaintiff's work performance relevant to the issue of qualification. However, it found that the issues resolved by the state court were not identical to those raised in the federal action because, unlike the case at bar, the state court's review was limited to the narrow grounds that permit reversal of arbitration awards - whether the arbitrator exceeded his authority or whether his decision was obtained by undue means. *Id.* at 705.

Lastly[7], *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F. 2d 5 (1st Cir. 1990) (cited at Br. 24) and *Brown v. Parker-Hannifin Corp.*, 746 F. 2d 1407 (10th Cir. 1984) are inapposite, since in neither case was the issue of plaintiff's qualifications litigated and resolved in a prior judicial proceeding. In the absence of findings that may not be relitigated, when a Title VII or ADEA defendant seeks summary judgment on the issue of whether the

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[6] Similarly, the Housing Authority does not contend that Owens's qualifications have any bearing on her retaliation claims in the case at bar.

[7] Owens cites one additional New York state proceeding, *State Division of Human Rights v. Syracuse*, 57 A.D. 2d 452, 394 N.Y.S. 2d 948 (4th Dept. 1977), aff'd mem. 43 N.Y. 2d 958 (1978), (cited at Br. 17) but the Housing Authority will not address it in detail since Owens has utterly mischaracterized and inaccurately described that decision. The "[permitted] appeal" in that case (Br. 17) was by the City, not the employee, and the decision confirmed the original finding by the State Division of Human Rights which, in rejecting the claim of discrimination, relied on the findings of the disciplinary proceeding that the plaintiff had committed numerous acts of misconduct. 57 A.D. 2d at 455-56.

plaintiff has met defendant's reasonable expectations[5], plaintiff's evidence of qualification must be given the benefit of any reasonable doubt. As the *Medina-Munoz* court observed:

> The record evidence as to job performance, while heavily weighted toward defendant's view, was nevertheless mixed. Strong evidence is not necessarily uncontradicted evidence; and at the summary judgment stage, the district judge cannot "superimpose his own ideas of probability and likelihood (no matter how reasonable those ideas may be) upon the [facts of] record." *Greenburg v. Puerto Rico Maritime Shipping Auth.*, 835 F. 2d 932, 936 (1st Cir. 1987.

Medina-Munoz, 896 F. 2d at 9, fn. 3.

But where the issue of job performance has been resolved in a prior adversary proceeding and the findings made in that proceeding have been confirmed by a state court, the *Medina-Munoz* court's concerns are dispelled. Where a state court has spoken, the federal court does not weigh, at the summary judgment stage, the probability or likelihood of the defendant's evidence that the plaintiff was not qualified for his or her job. The state court has resolved the issue and, as in the case at bar, the District Court applies the result.

III. The circuits differ over whether an unfiled retaliation claim is *per se* reasonably related to a discrimination claim filed with EEOC.

Owens asserts that this Court need not review this issue because there is no dispute among the circuits. To reach this conclusion, however, Owens stresses semantics over reality. The issue presented to this Court for review is not whether a court employs particular magic words, but how it actually uses those words to determine whether or not to hear a claim of retaliatory discrimination

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[5] It is unclear whether the *Parker-Hannifin* court was applying the "reasonable expectation" or "basic skills" standard of job qualification. While the court appeared at one point to adopt the "basic skills" approach, 746 F. 2d at 1409, the court later relied on the plaintiff's evidence of good job performance. *Id.* at 1410. To the extent that the Tenth Circuit may have used the "basic skills" approach, this would indicate a further division among the Circuits between the "basic skills" and "reasonable expectations" standards which this Court should resolve.

that was never filed with EEOC. Owens acknowledges, and even quotes, the statement in the decision below that "allegations of retaliation ***are seen as stemming*** from the earlier discriminatory incident" *Owens, supra*, 934 F. 2d at 411 (quoted at Br. 29). (Emphasis added.) Owens omitted the preceding sentence, in which the court below stated, in the plainest terms, that "the retaliation claim is ***deemed*** 'reasonably related' to the original EEOC filing." *Id.* (Emphasis added.) Nevertheless, Owens concludes that the Second Circuit's position does not differ from those circuits which not only recite the "reasonably related" rule, but analyze the facts of each case to determine if a reasonable relationship actually exists. Owens's conclusion that there is no dispute among the circuits is clearly the product of wishful thinking, but wishing will not make the issue go away.[9]

Owens contends that the Fifth Circuit in *Gupta v. East Texas State Univ.*, 654 F.2d 411 (5th Cir. 1981) did not apply a per se rule for unfiled retaliation claims. Although the *Gupta* court recited "ancillary jurisdiction" in its ruling, that court "[held] it unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." *Id.* 654 F. 2d at 414. The court described its holding as "***eliminating*** this needless procedural barrier". *Id.* (Emphasis added.) Surely, if, as Owens suggests, the Fifth Circuit were applying a limited rule of ancillary jurisdiction to unfiled retaliation claims which arise after a Title VII action is filed, as the Fourth Circuit did in *Aronberg v. Walters*, 755 F.2d 1114 (4th Cir. 1985), it would not have described its holding as "eliminating" a procedural "barrier". Moreover, those courts which have deliberated whether or not to follow *Gupta* have plainly viewed it as establishing a per se rule. *Aronberg*, 755 F. 2d at 1115, fn. 1; *Baker v. Buckeye Cellulose Corp.*, 856

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[9] Indicative of such wishful thinking is the assertion that the Housing Authority "mistakenly" relied on *Stewart v. United States Immigration and Naturalization Service*, 762 F.2d 193 (2d Cir. 1985). (Br. 33) The Housing Authority made no mistake in citing *Stewart*, which shows that the Second Circuit formerly employed a legitimate "reasonable relationship" test for unfiled retaliation claims, but abandoned that position in the decision below.

F.2d 167, 169 (11th Cir. 1988); *Pritchett v. General Motors Corp.*, 650 F. Supp. 758, 762 (D. Md. 1986); *Bickley v. Univ. of Maryland*, 527 F. Supp. 174, 177-79 (D. Md. 1981).

In desperation, Owens mischaracterizes this Court's decision in *Love v. Pullman Co.*, 404 U.S. 522 (1972), as standing for the proposition that filing a discrimination complaint with EEOC is a procedural technicality. To the contrary, *Love* concerned a Title VII claimant who had, properly, filed a charge with EEOC, which then deferred to a state anti-discrimination agency. The Court held that after the state agency ends its investigation, the claimant need not re-file the *same* charge with EEOC. In no way did this Court trivialize or minimize the need for filing a claim with EEOC. Rather, *Love* stands for the proposition that a claimant who properly files a discrimination claim should not be penalized for having done so.[10]

Conclusion

For the foregoing reasons, and those discussed in the petition of the New York City Housing Authority, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] Although Owens asserts that filing a complaint with EEOC is a dispensable triviality, she nevertheless notes that in June 1984 she sent a letter to EEOC purportedly describing her retaliation claim, and that the Housing Authority "overlooks" this "evidence". (Br. 35, fn. 20) Owens fails to point out that she sent this letter one year after the alleged retaliation occurred and two months after EEOC issued its decision and "right to sue" letter. She also fails to note that she "overlooked" this letter herself when she filed her district court complaint, one month later, and failed to include any claim of retaliation.